D.G. & D. LOGGING CO.
v.
BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-30-A Decided August 29, 1991

Appeal from an assessment of damages for violations of a timber cutting permit.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Acts of Agents of the United States--Federal Employees and Officers: Authority to Bind Government

Unauthorized acts of a Bureau of Indian Affairs employee cannot serve as the basis for conferring rights not authorized by law.

2. Indians: Timber Resources: Timber Sales Contracts: Generally

Under the Bureau of Indian Affairs' general forest regulations, "stumpage rate" means the stumpage value of timber, i.e., the value of uncut timber as it stands in the woods. 25 CFR 163.1.

APPEARANCES: Dale Michael Parsons, appellant's president, and K. Dale Schwanke, Esq., Great Falls, Montana, for appellant; Gerald R. Moore, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant D. G. & D. Logging Company seeks review of a November 16, 1990, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the assessment of damages in the amount of $5,245.40 for violations of BIA Timber Cutting Permit No. C-19-90, Burns Mill 1990 Timber Sale, on the Blackfeet Reservation. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

By letter of March 13, 1990, the Chairman of the Blackfeet Tribal Business Council advised the Blackfeet Agency, BIA, that appellant was

"a 100% Blackfeet Indian owned company with a certification application on file with the Tribal Employment Rights Office." The Chairman authorized BIA to grant a timber cutting permit to appellant on a trial basis and, upon satisfactory completion of logging under the permit, to award further permits.

On July 11, 1990, the Superintendent, Blackfeet Agency, issued Permit No. C-19-90 to appellant for approximately 14 acres of tribal land in the NE¼, SE¼, sec. 10, T. 37 N., R. 15 W., Principal Meridian, Glacier County, Montana. The permit authorized appellant to cut and remove "Lodgepole Pine and other species 98.50 MBF [thousand board feet], estimated and not guaranteed" for "stumpage $44.89 + planting fee $14.21 = total $59.10 per MBF." In addition to the standard permit provisions, appellant's permit contained several special provisions. Those relevant to this dispute are as follows:

> 1. This is a select cut, leave trees are marked with yellow paint. All unmarked merchantable trees will be felled and removed. * * * Marked trees will not be felled and regeneration will be protected to the maximum extent feasible.
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> 4. Unit boundaries are marked with blue flagging.
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> 7. New road construction is not necessary and will not be allowed. The Permittee is authorized to maintain existing roads as necessary. The access road will be left in driveable condition when logging is finished. * * *
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> 9. Unnecessary damage to the residual trees will result in assessment of damages for regeneration.
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> 11. Trees intentionally damaged, or cut in trespass, will be billed at triple the stumpage rate with a minimum of $100.00 per occurrence. Trees damaged during logging will be cut at the direction of the Officer-in-Charge.
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> * * * * * *
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> 18. Violation of the terms of this permit may result in shut down of operations and/or a $250.00 Administrative penalty. Shut down may continue until both the penalty is paid and the problem is resolved.

Appellant had not previously been awarded a timber contract or permit on the Blackfeet Reservation. A Blackfeet tribal policy imposed a limitation of 100 MBF upon the first sale to a logging company without prior experience on the reservation. Accordingly, appellant's permit was limited to 98.50 MBF. The unit was chosen from three blocks of timber which had been marked with blue flagging. Block A, covering 0.7 acre, was estimated to contain 4.93 MBF of timber. Block B, covering 8.7 acres, was estimated to contain 61.21 MBF. The third block, as originally designated, contained too much timber to comply with the 100 MBF tribal limitation. Accordingly, it was divided by orange flagging into Blocks C and D. Block C, included in appellant's unit, covered 4.6 acres and was estimated to contain 32.36 MBF. Block D, which was excluded, covered 2.3 acres and was estimated to contain 16.18 MBF.

Appellant apparently began logging immediately upon issuance of its permit on July 11, 1990. On July 17, 1990, the Blackfeet Agency Forest Manager inspected appellant's operations, observed violations of the permit, prepared a handwritten notice of violation, and delivered it to Gus Vaile, one of appellant's principals. The following day, the Superintendent wrote to appellant, stating:

> Your logging operation is hereby shut down until further notice. You are not to engage in any logging activity on your Burns Mill 1990 Timber sale.
>
> Reasons are:
>
> 1. You fell[ed] an estimated four or five acres of timber outside the designated unit boundary.
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> 2. You fell[ed] several trees within the unit that were clearly marked as leave trees. Refer to Special Provision #1.
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> 3 . You constructed two unauthorized roads into the cutting unit. Refer to Special Provision #7.
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> 4. You constructed these roads from an existing road on allotted land and have been hauling logs over the allotment after being specifically informed that this would require a written right-of-way. A verbal OK from the allotment owner is not sufficient.
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> We will send you a bill for the damages when they are computed.
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> The following actions on your part will be necessary:
>
> 1. Obtain a right-of-way from our Right-Of-Way Officer and obtain the signature of the allotment owner.
>
> 2. Waterbar the roads to retard erosion.

3. Rip the roads (but not the waterbars) to discourage people from driving on them. Also, install kelly-humps on the roads at their points of intersection with previously-existing roads.

On July 23, 1990, the agency sent appellant a bill for collection in the amount of $5,245.40. This amount included a $250 administrative penalty, regeneration costs for unauthorized roads and skid trails, and triple-stumpage-rate damages for the timber cut outside the unit and the felled leave trees.

Appellant paid the assessment under protest and appealed it to the Area Director. On August 2, 1990, appellant was permitted to resume operations.

On appeal to the Area Director, appellant contended that it had been verbally authorized to cut timber "below the orange flagging" and to fell leave trees within the unit. This authorization was given, appellant asserted, by Robert Mad Plume, who was either a BIA employee or a tribal employee working under the direction of the agency Forest Manager. 1/ Appellant further contended that construction of a new road was necessary in order to haul timber out of the area and that it had obtained the consent of the owner of the allotment over which the road passed. Finally, appellant contended that the damages were incorrectly based on the rate of $59.10 per MBF, rather than $44.89 per MBF.

On November 16, 1990, the Area Director affirmed the Superintendent's assessment of penalties and damages.

Appellant's notice of appeal from the Area Director's decision was received by the Board on December 17, 1990. Both appellant and the Area Director filed briefs.

Discussion and conclusions

On appeal to the Board, appellant makes a general allegation that it was misled by Mad Plume but specifically alleges, in this regard, only that Mad Plume purported to authorize appellant to cut timber below the orange flagging. Appellant seeks an evidentiary hearing on this question. It also appears to argue that BIA is estopped by the statements allegedly made by Mad Plume. Further, appellant reiterates its earlier contention that damages were incorrectly calculated.

The Board first addresses those conclusions made by the Area Director which appellant has not specifically challenged.

Although the Area Director's decision did not identify the areas outside the unit in which appellant was found to have cut timber, it is clear

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1/ He is identified as both in the record. For purposes of this decision, the Board assumes that he was a BIA employee.

from the record that two areas were involved. One was the 2.3-acre tract identified as Block D, which adjoined Block C and was partitioned from Block C with orange flagging. The other area was an unflagged 1.5-acre tract, which was 137 feet away from the closest unit area and separated from it by a stand of aspen. Appellant's unauthorized operations in this second area were described in a September 24, 1990, memorandum from the Superintendent to the Area Director (Superintendent's memorandum) and were also discussed in the Area Director's brief in this appeal. Appellant was furnished with a copy of the Superintendent's memorandum and has had an opportunity to respond to that memorandum and to the Area Director's brief. Appellant has neither denied that it felled timber within the 1.5-acre tract nor alleged that any BIA employee authorized it to fell timber there. In fact, appellant has not discussed this tract at all in its filings in this appeal. Under these circumstances, appellant is deemed to have conceded that the Area Director's decision is correct insofar as it held that appellant violated its permit by cutting timber in this area.

Appellant does not contend that Mad Plume or any other BIA employee authorized it to construct new roads. Rather, it argued before the Area Director that a new road was necessary to haul timber out of the permit area. 2/ Appellant also contended that it was given permission by the owner of an allotment over which part of the new road passed. 3/ The Superintendent's memorandum stated that appellant constructed two new roads. The first was 1,100 feet long, with 685 feet outside the permit unit. A 135-foot segment of this road crossed the allotment, and the reminder crossed tribal land. The second new road, the Superintendent stated, was a 1,600-foot extension to an existing road on tribal land. Again, appellant has had an opportunity to refute the Superintendent's statements but has not done so. Appellant's permit clearly stated that "[n]ew road construction * * * will not be allowed" (Permit at Special Provision 7). Appellant has not shown error in the Area Director's decision insofar as it held that appellant violated its permit by constructing the roads.

Appellant contended before the Area Director that Mad Plume consented to the felling of leave trees, after appellant determined the trees had to be cut to establish a landing. It is not clear whether appellant intends to pursue this contention before the Board. The Board assumes, for purposes of this decision, that appellant intends to encompass this contention within its general allegation that it was misled by Mad Plume.

2/ Appellant does not pursue any argument concerning the roads before the Board. It is possible that appellant does not intend to challenge that aspect of the Area Director's decision.

3/ The record includes a "Consent of Owners to Grant of Right-of-Way" signed by the allottee. However, it is dated July 19, 1990, the day following the Superintendent's order shutting down appellant's operation. Apparently, appellant constructed the road over the allotment after obtaining the verbal consent of the allottee's son.

Appellant's specific contention before the Board is that Mad Plume authorized it to cut below the orange flagging. i.e., within Block D. In its statement of reasons before the Area Director, appellant contended that Mad Plume was the authorized representative of the Officer in Charge and therefore had the authority, under Standard Provision 5 of appellant's permit, to consent to the cutting of the leave trees and the timber below the orange flagging. Standard Provision 5 states: "Only such timber as designated by the Approving Officer or the Officer in Charge may be cut." "Officer in Charge" is defined in Standard Provision 3 as "the forest officer of highest rank assigned to the supervision of forestry work at the Indian Agency having jurisdiction over the permit area, or his authorized representative." 4/

The Superintendent's memorandum denied that Mad Plume consented to the felling of either the leave trees or the timber below the orange flagging. Before the Board, the Area Director continues to deny that such permission was given. The Area Director further argues that Mad Plume had no authority to alter the term of the permit. Even if Mad Plume did consent, the Area Director contends, BIA cannot be bound by the unauthorized acts of its employees.

Appellant's permit is explicit in its prohibition against the felling of marked trees (Permit at Special Provision 1). Accordingly, if Mad Plume consented to the felling of these trees, he was taking it upon himself to alter the terms of the permit.

Appellant's permit is more ambiguous with respect to the area included within the unit. Special Provision 4 states that "[u]nit boundaries are marked with blue flagging." As noted above, blue flagging delineated the boundary of the original Block C/D which, upon inspection, was found to contain too much timber to allow its entire inclusion in the unit. The original block was therefore divided by orange flagging. Although Special Provision 4 might be interpreted as permitting logging within Block D as well as Block C, the permit states that it covers an area of approximately 14 acres, which is the combined acreage of Blocks A, B, and C. With Block D included, the permit area would have been 16.3 acres. Similarly, the permit states that it includes approximately 98.50 MBF of timber, a figure that would have been exceeded by 16.18 MBF had Block D been included in the unit.

Although the permit itself is arguably ambiguous as to the unit boundaries, appellant concedes that "Mad Plume ran a line in orange flagging and informed the Appellant that they were not supposed to cut below the orange flagging at that time" (Statement of Reasons at 3). Appellant contends, however, that, on the same day, Mad Plume

> informed appellant's representatives that if they ran out of timber to go ahead and cut below the orange line but within the

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4/ For purposes of this decision, the Board assumes that Mad Plume was an authorized representative of the Officer in Charge, i.e., the agency Forest Manager.

> blue flagging which indicated the unit boundary. He stated that they could go ahead as he was planning to attend "Indian Days" and would not be in the office until after the weekend and that they could come in and sign papers at that time.

(Statement of Reasons at 4). 5/

In light of appellant's concession, the Board takes as established fact that Mad Plume informed appellant that the orange flagging delineated the unit boundary. Mad Plume's action in this regard was one of clarifying the terms of the permit and would seem to be well within the authority of an authorized representative of the Officer in Charge under Standard Provision 5 of the permit. Since the unit boundary was thus made clear, however, any further statement Mad Plume might have made, purportedly authorizing logging below the orange flagging, would clearly have been beyond his authority. Such a statement would have constituted permission to log in an area known to be beyond the unit boundaries.

The Board agrees with the Area Director that Mad Plume lacked authority to alter the terms of appellant's permit, either by excising the explicit prohibition against felling leave trees or by enlarging the unit area. These are authorities reserved to the Approving Officer, i.e., the Superintendent. See Billings Area Office Addendum to 10 BIAM at 3.4(E).

[1] It is well established that the Federal Government is not bound by the unauthorized or ultra vires acts of its employees. See, e.g., Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). The Board has held on several occasions that unauthorized acts of a BIA employee cannot serve as the basis for conferring rights not authorized by law. E.g., Death Valley Timbi-Sha Shoshone Tribe v. Sacramento Area Director, 18 IBIA 196 (1990); Martineau v. Billings Area Director, 16 IBIA 104 (1988). In this case, even if Mad Plume made the statements appellant alleges he made, purporting to authorize appellant to cut leave trees and timber outside the unit, appellant could not prevail in this appeal, because such authorizations were beyond Mad Plume's authority. 6/

5/ The Superintendent's memorandum responded to this allegation as follows:

"Mr. Mad Plume divided a block of lodgepole pine timber with orange ribbon so as to locate the proper number of acres (i.e. board feet) on each side of the line. We intended to include the other part of this block in the next sale we awarded D.G. & D. Logging. Our Forest Manager told the principals that would be a separate sale and would require a separate permit, to be issued upon successful completion of this sale. Mr. Mad Plume reiterated this position when he flagged in the line. It is possible this might have been construed as 'go ahead and cut below the orange line,' but not by someone who understood the concepts of 'timber sale' and 'permit.'" (Superintendent's Memorandum at 2-3).

6/ In light of this conclusion, the Board finds it unnecessary to resolve the factual dispute as to whether Mad Plume did or did not purport to authorize these acts. Therefore, appellant's request for an evidentiary hearing is denied.

Appellant's final argument concerns the calculation of damages. The Superintendent calculated damages for the unauthorized timber cutting at three times $59.10 per MBF. Appellant contends that $44.89, rather than $59.10, was the stumpage rate under its permit and should have been used to calculate damages. This contention is premised on the language of the permit which, as noted above, described the price of the timber as: "stumpage $44.89 + planting fee $14.21 = total $59.10 per MBF."

[2] 25 CFR 163.1 defines "stumpage rate" as "the stumpage value per thousand board feet or other unit of measure." It defines "stumpage value" as "the value of uncut timber as it stands in the woods." The Superintendent's memorandum states that the appraised value of the timber in the unit was $59.10 per MBF. 7/ Clearly, under the definitions in 25 CFR 163.1, the stumpage rate for appellant's permit was $59.10 MBF.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Billings Area Director's November 16, 1990, decision is affirmed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

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7/ The memorandum states at page 1:

"Our customary way of determining stumpage rates is as follows: Our Branch of Forestry appraises a given timber sale by the residual value appraisal method to determine fair market value for the timber. This becomes the stumpage rate for the sale since permits are awarded, without competitive bidding, to Tribal members who can demonstrate proficiency in logging and who request a permit. The stumpage rate is then divided into two figures for the purpose of determining where the money goes. The portion that is designated to pay for post-sale development or rehabilitation work is deposited in a special deposit account and is labeled for the specific purpose, in this case "planting fees" to pay for regeneration costs. The balance is labeled "stumpage" for clarification that this is the amount paid to the land owner, less the 10% administrative deduction. The appraised fair market value of this sale was $59.10 per thousand board feet. This is the stumpage rate and the planting fees are part of it."